

SUPREME COURT OF NOVA SCOTIA

Citation: *Certification Coating Specialists Inc. v. Halifax-Dartmouth
Bridge Commission*, 2016 NSSC 250

Date: 20160922

Docket: HFX450768

Registry: Halifax

Between:

The Bowra Group Inc. as Receiver and Trustee in
Bankruptcy for Certified Coating Specialists Inc.

Plaintiff

v.

Halifax-Dartmouth Bridge Commission operating as
Halifax Harbour Bridges, and Cherubini Metal Works Limited

Defendants

DECISION

Judge: The Honourable Justice Michael J. Wood

Heard: September 6, 2016, in Halifax, Nova Scotia

Counsel: John Shanks, for the Plaintiff
The Bowra Group Inc. as Receiver and Trustee in Bankruptcy for
Certified Coating Specialists Inc.

Christopher Robinson, QC, and Kevin Gibson for the Defendant
Halifax-Dartmouth Bridge Commission operating as Halifax
Harbour Bridges

Doug Tupper, QC, for the Defendant
Cherubini Metal Works Limited

Michael Pugsley, QC, for the Attorney General of Nova Scotia
Intervenor Counsel

By the Court:

[1] The *Builders' Lien Act*, R.S.N.S., 1989, c.277, provides protection to contractors to ensure they are paid for services and materials provided to a construction project. If they satisfy the conditions set out in the *Act* the property which benefited from their work may be sold and the proceeds applied to the debt. This application raises the question of whether a subcontractor working on the "Big Lift" is entitled to a builders' lien on the Angus L. MacDonald bridge with the potential to sell the bridge should their claim remain unpaid. In my view they are not.

Background

[2] The Big Lift is the name given to the project whereby the road deck, beams, stiffening trusses, and suspender ropes on the MacDonald bridge are being replaced. It is one of two bridges which span Halifax harbour. American Bridge is the primary contractor hired by the Halifax-Dartmouth Bridge Commission which owns and operates the MacDonald bridge. American Bridge hired Cherubini Metal Works Limited to fabricate and supply 46 separate road deck panels to be incorporated in the project. Certified Coating Specialists Inc. ("CCS Inc.") was a subcontractor retained by Cherubini to paint the deck panels at their facility in Dartmouth.

[3] In January 2016 CCS Inc. was placed into bankruptcy and the plaintiff Bowra Group Inc. was appointed receiver and trustee in bankruptcy. CCS Inc. stopped work under its contract with Cherubini and at that time had painted only 11 of the 46 deck panels. A dispute arose between Cherubini and Bowra as to whether CCS Inc. was owed any further payment pursuant to its subcontract.

[4] On March 16, 2016, Bowra filed a builders' lien against 13 parcels of land owned by the Bridge Commission. Some were the lands on which the MacDonald bridge supports are located and other were lots adjoining the area of the bridge toll plaza in Dartmouth.

[5] This proceeding was commenced by statement of claim on April 29, 2016, and a certificate of *lis pendens* was registered against the properties as required by the *Act*.

Nature of the Application

[6] Cherubini has brought an application to vacate the registration of the Bowra builders' lien pursuant to s. 29(4) of the *Act* which provides as follows:

Upon application, the court or judge having jurisdiction to try an action to realize a lien, may allow security for or payment into court of the amount of the claim, and may thereupon order that the registration of the lien be vacated or may vacate the registration upon any other proper ground and a certificate of the order may be registered.

[7] Although this section refers to an application, once a proceeding is commenced the request is dealt with as a motion under the *Civil Procedure Rules*. It is summary in nature with evidence presented by way of affidavit. Contrary to the argument by counsel for Cherubini the motion is not similar to a request for summary judgment but rather a procedure unique to the builders' lien regime.

[8] When a lien is filed it can have significant repercussions for all parties involved in the construction project, particularly if the work has yet to be completed. It can interrupt the flow of money from lenders or through the chain of subcontracts. If there are issues about the validity of the lien there must be a mechanism to have them resolved in a timely fashion provided the issue can be dealt with summarily. That is the purpose of s. 29(4).

[9] The party making an application to vacate the registration of a lien must satisfy the court that it is entitled to that remedy. As in any civil case the burden of proof is on the balance of probabilities. Sometimes the evidence with respect to the validity of the lien may be unclear and require consideration of witness credibility and expert evidence. Such cases would not lend themselves to summary disposition and may require trial. In those circumstances a judge hearing an application under s. 29(4) of the *Act* may refuse to decide the question of validity.

Position of the Parties

Cherubini

[10] The applicant Cherubini says the MacDonald bridge is a public street or highway and as a result the *Builders' Lien Act* has no application. They rely on s. 3(1) of the *Act* which provides:

Nothing in this *Act* extends to any public street or highway or to any work or improvement done or caused to be done thereon.

Halifax-Dartmouth Bridge Commission

[11] The Bridge Commission filed a letter indicating it supported the position of Cherubini but otherwise made no submissions at the hearing.

Attorney General of Nova Scotia

[12] The Attorney General became an intervenor by consent. They filed affidavits and a brief in which they supported the position of Cherubini. In addition they argued that the Bridge Commission was a provincially controlled public sector entity and therefore fell within s. 3(2) of the *Act* prohibiting liens against the provincial crown.

Bowra

[13] Bowra argued that the issue of the validity of its lien should not be dealt with on a summary application. Before something could be considered a public street or highway it was necessary to have evidence that it was owned by a public agency. They disagreed that the Bridge Commission fell into that category and pointed out provisions in their constituting legislation which illustrated its independence from the province.

[14] Bowra also argued that the five lots adjacent to the toll plaza were covered by the lien but not part of any street or highway and therefore not caught by s. 3(1) of the *Act*.

Analysis and Disposition

[15] The *Act* does not include a definition of the phrase “any public street or highway” which is central to determining the application of s. 3(1). In the absence of a statutory definition counsel for Cherubini suggest those words be interpreted based upon their normal usage. I agree.

[16] Counsel provided a number of dictionary definitions of “public”, “highway”, and “street”. These suggest that by using the word public in the *Act* the legislature has indicated that use must be open or available to all members of the community. A highway or street is usually a designated route for travel by vehicle as part of a transportation system.

[17] Counsel for Bowra argued that the issue of ownership was also relevant to determining whether a street was public. He said that a thoroughfare across a shopping mall parking lot should not be considered a public street for purposes of the *Act*. I agree with that submission however I note that it is not necessary that title be vested in the crown in order for the road to be public. If that were so, s. 3(1) would be unnecessary because of the prohibition against liens on crown land found in s. 3(2).

[18] A consideration of the policy reasons why roads and highways are excluded from builders' liens will assist in determining the scope of s. 3(1). In **Turf Masters Landscaping Ltd. v. T.A.G. Developments Ltd.**, [1994] N.S.J. 421, the court commented as follows:

36 I do not think this argument is particularly persuasive. The *Act* refers only to public streets and highways. The city submits that the spirit of the legislation was meant to cover the present situation. I am not satisfied that is so. The problem allowing liens on public streets and highways is that it is almost inevitable that members of the general public will have to use them. To allow some individual a right of claim with regard to such a structure is to restrict the rights of others who rely on their ability to use them. Although I do not suggest that public parks are of no value to the general population, the use of a specific park area is not a necessity to an individual. In a practical context, however, there may be no realistic alternative to the use of certain roadways. Similarly, hospitals owned by a public authority may be exempted from lien on the basis that the public's access to such institutions should not have a potential for restriction. It could be detrimental to the health of the general public, in a very real sense (see **Westeel-Rosco Ltd. v. South Saskatchewan Hospital Centre** (1977) 2 S.C.R. 238). Allowing the imposition of a lien on the park land in question does not prohibit the city from constructing a similar park in another nearby area. Furthermore, there have been a number of decisions allowing liens on municipal property other than that enumerated in s.3 of the *Act* (see **Prairie Roadbuilders Ltd. v. Settler (Country No. 23)** (1983), 27 Alta. L.R. (2d) 289 (Master)). I feel therefore that s. 3 of the *Mechanics' Lien Act* does not exempt the lands in question from lien.

[19] For purposes of this application I need to determine whether the road deck on the MacDonald bridge is a public street or highway. If it is, then the incorporation of the panels painted by CCS Inc. does not create any rights under the *Act*.

[20] In deciding whether s. 3(1) applies I need to consider the extent to which the MacDonald bridge is a road used by members of the community and whether there is some restricted or private aspect to it. I take judicial notice of the following facts:

- It is one of two bridges providing vehicle access across Halifax harbour between the former cities of Halifax and Dartmouth.
- Traffic enters directly into the street systems of the two communities from the bridge.
- It is used by both public and private vehicles including scheduled transit bus routes.
- There are posted speed limits and electronic traffic signals.
- Although users are required to pay a toll the process is essentially automated and available to all drivers.

[21] I agree with counsel for Bowra that I should also consider the nature of the Bridge Commission itself in order to determine whether it is analogous to a municipality or the province as opposed to a private owner, such as a commercial landlord. I do not have to decide whether the Bridge Commission is a provincially controlled public sector entity as argued by the Attorney General. While that might be the case if the issue was the applicability of s. 3(2) of the *Act* this application has been brought under s. 3(1).

[22] There is a significant public aspect to the Bridge Commission and its operation. I say this primarily based upon an examination of the *Halifax-Dartmouth Bridge Commission Act*, S.N.S. 2005, c.7. According to that legislation the Bridge Commission has the following attributes:

- It is a public utility within the meaning of the *Public Utilities Act* (s. 19).
- All members of the commission are appointed by either the Province of Nova Scotia or Halifax Regional Municipality (s. 3).
- It has the power to expropriate land for purposes of the bridges (s. 12).
- It has the authority to construct, maintain, and operate transportation projects across Halifax harbour which includes a bridge, tunnel, fixed crossing or similar structure (s. 27(1)).

[23] For the above reasons I am satisfied that the road which crosses the MacDonald bridge is a “public street or highway” within the meaning of s. 3(1) and therefore any work on it is exempt from application of the *Act*. CCS Inc. painted the deck panels which were incorporated in the new road deck. No builders’ lien rights arose under the *Act* in favour of CCS Inc. This means they are

not entitled to register liens against the lands on which the bridge sits nor any other property used or enjoyed in conjunction with the operation of the bridge. This includes the five parcels located adjacent to the toll plaza in Dartmouth.

[24] As a result of my conclusion I will grant Cherubini's application that the builders' liens and certificates of *lis pendens* filed by Bowra against lands of the Bridge Commission be vacated. It is unnecessary to deal with the arguments raised by the Attorney General with respect to s. 3(2) of the *Act*.

[25] My decision with respect to the validity of the builders' lien does not mean the dispute between Bowra and Cherubini has been resolved. This proceeding will continue as an action by Bowra against Cherubini in which CSS Inc.'s entitlement to payment will be determined in the usual fashion.

[26] If the parties are unable to agree on the question of costs I will receive written submissions within 30 days of the date of this decision.

Wood, J.